Supreme Court, U. S.
FILED
JAN 6 1976
MICHAEL RODAK, JR., CLERK

No. 75-185

Supreme Court of the United States

OCTOBER TERM, 1975

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL.,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND KEARNEY & TRECKER CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae* in support of the position of the petitioners is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 110 national and international unions having a total membership of approximately 14,000,000 men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

STATEMENT OF THE CASE

A collective agreement between the Kearney & Trecker Corp. and Local Lodge 76, International Association of Machinists covering hourly employees at the Employer's

machine tool plants in Milwaukee, Wisconsin terminated on June 19, 1971. On March 1, 1972, after the negotiations for a new contract had reached impasse, Kearney & Trecker announced that on March 13 it would unilaterally put into effect one of its bargaining demands rejected by the Union. In accord with 17 years of past practice the prior contract had provided for a 7½-hour basic work day, Monday through Friday, and a 37½-hour basic work week. The Company proposed to substitute an 8-hour basic work day and 40-hour basic work week. From the employee standpoint, since overtime work had always been optional, this would have instituted an adverse change in working conditions, and since premium overtime rates were paid for hours worked in excess of the basic work day or work week, Kearney & Trecker's proposed action would also have effected a cut in pay.

In response, at a meeting on March 7, the Union's members unanimously passed resolutions that no member should work overtime, defined as over 7½-hours per day and 37½-hours per week. And, all but a few Union employees continued to work on the terms previously established but refused to accept the overtime work proffered. Kearney & Trecker did not put the 8-hour day and 40-hour week into effect, nor did the Employer take any action against the employees who refused to accept overtime assignments. Instead Kearney & Trecker filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging that the employees' concerted activity was unlawful under Wisconsin law. The WERC agreed and its order "enjoining [the] concerted refusal to work overtime" was affirmed by the Wisconsin Supreme Court. (See Pet. App. A. 3-A. 4, A. 5.)

ARGUMENT

The Wisconsin Supreme Court believed that the concerted activity here was akin to the "partial or 'quickie' strike" at issue in *Auto Workers* v. *Wis. Board,* 336 U.S. 245 ("*Briggs & Stratton*"), and that the principle governing this case is the one stated in *Briggs & Stratton*: "Policing of such conduct is left wholly to the states." (See Pet. App. A. 14, quoting 336 U.S. at 253.) But, as we now show, *Briggs & Stratton* is no longer good law.

1. There are two measures this Court has utilized to determine whether the National Labor Relations Act, as amended, displaces State law. The first is the principle of general application, initially applied in this context in *Hill* v. *Florida,* 325 U.S. 538, 542, that even where a State has jurisdiction to decide a case it may not do so in a manner that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines* v. *Davidowitz,* 312 U.S. 52, 67." (See also, e.g., *Bus Employees* v. *Missouri,* 374 U.S. 74; *Teamsters Union* v. *Morton,* 377 U.S. 252; *Linn* v. *Plant Guard Workers,* 383 U.S. 53; *Nash* v. *Florida Industrial Commission,* 389 U.S. 235; *Beasley* v. *Food Fair of North Carolina,* 416 U.S. 653; *Connell Co.* v. *Plumbers & Steamfitters,* 421 U.S. 616.) The second is the principle that the National Labor Relations Board (NLRB) has exclusive primary jurisdiction over a case in which the activity complained of "is arguably subject to § 7 or § 8 of the Act * * *" (*San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 245).

The Wisconsin Supreme Court focused on the question of whether *Briggs & Stratton* survived the restatement of the exclusive primary jurisdiction doctrine in *Garmon.* We

submit that the interests at stake are more clearly exposed by considering whether the *Briggs & Stratton* holding can be squared with the definitive statement of the federal labor policy as to the use of peaceful economic weapons in support of a negotiating position set forth in *Labor Board* v. *Insurance Agents,* 361 U.S. 477 and its progeny.

2.(a) In *Briggs & Stratton*:

> "[T]he Union had negotiated collective bargaining agreements, the last of which expired on July 1, 1944. Negotiation of a new one reached a deadlock and bargaining sessions continued for some time without success.
>
> "On November 3, 1945, its leaders submitted to the Union membership a plan for a new method of putting pressure upon the employer. The stratagem consisted of calling repeated special meetings of the Union during working hours at any time the Union saw fit, which the employees would leave work to attend. It was an essential part of the plan that this should be without warning to the employer or notice as to when or whether the employees would return. The device was adopted and the first surprise cessation of work was called on November 6, 1945; thereafter, and until March 22, 1946, such action was repeated on twenty-six occasions. The employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them." (336 U.S. at 249.)

The company filed a complaint with the Wisconsin Employment Relations Board the end result of which was a court order which "for[bade] individual defendants and members of the Union from engaging in concerted effort to interfere with production by doing the acts instantly involved." (*Id.* at 250.)

As the Wisconsin Supreme Court recognized here (Pet. App. A. 14), the theory which formed the basis for this Court's affirmance of the *Briggs & Stratton* order was that:

> "While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. * * * There is no existing or possible conflict or overlapping between the authority of the federal and state Boards, because the federal Board has no authority either to investigate, approve or forbid the union conduct in question." (336 U.S. at 253-254.)

This distinction between the "purposes" for which economic force may be employed—which *Briggs & Stratton* recognized to be the concern of the NLRA—and the "methods" utilized—which were deemed the sole concern of the States—survived for only one year. *Automobile Workers* v. *O'Brien,* 339 U.S. 454, presented the question of whether "the strike vote provision of the Michigan labor mediation law" which called "for a notice given 'In the event the parties . . . are unable to settle any dispute' to be followed by mediation, and if that is unsuccessful by a strike vote within twenty days, with a majority required to authorize a strike" (*id.* at 455, 458), could be squared with the regime for settling industrial disputes created by the NLRA. The State's "labor mediation law" plainly regulated the "method" by which economic force was applied by establishing preconditions to the use of the strike, and not the "purposes" being pursued. Nevertheless, a unanimous Court overturned the Michigan statute:

"Congress [has] safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act. It established certain prerequisites, with which appellants complied, for any strike over contract termination or modification. §8(d). These include notices to both state and federal mediation authorities; both did participate in the negotiations in this case. In provisions which did not affect appellants, Congress forbade strikes for certain objectives and detailed procedures for strikes which might create a national emergency. §§8(b)(4), 206-210. None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation." (*Id.* at 457; footnotes omitted.)

O'Brien was followed in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383. There the Court found the State's Public Utility Anti-Strike Act, which "substitute[d] arbitration upon order of the [Wisconsin] Board for collective bargaining whenever an impasse is reached in the bargaining process [a]nd, to insure conformity with the statutory scheme, • • • denie[d] to utility employees the right to strike" (*id.* at 388), incompatible with the NLRA:

"In 1947 Congress enacted special procedures to deal with strikes which might create national emergencies. Respondents rely upon that action as showing a congressional intent to carve out a separate field of 'emergency' labor disputes and, pointing to the fact that Congress acted only in respect to 'national emergencies,' respondents ask us to hold that Congress intended, by silence, to leave the states free to regulate 'local emergency' disputes. • • • [C]ongressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows

that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. *Automobile Workers* v. *O'Brien, supra,* at 457." (*Id.* at 393-394.)

In sum "Collective bargaining, with the right to strike at its core, is the essence of the federal scheme[;] • • • a state law which denies that right cannot stand under the Supremacy Clause of the Constitution." (*Bus Employees* v. *Missouri,* 374 U.S. 74, 82.) Thus, the States are foreclosed from regulating both the "methods" utilized and the "purposes" pursued when that weapon of economic force is employed.[1]

(b) In *O'Brien* Chief Justice Vinson sought to harmonize the result reached there and in *Briggs & Stratton* by narrowing the rationale of the earlier case:

"The employees' conduct [in *Briggs & Stratton*] was 'a new technique for bringing pressure upon the employer,' a 'recurrent or intermittent unannounced stoppage of work to win unstated ends.' [336 U.S.] at 249, 264. That activity we regarded as 'coercive,' similar to the sit-down strike held to fall outside the protection of the federal Act in *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), and to the labor violence held to be subject to state police control in *Allen-Bradley Local* v. *Wisconsin Board,* 315 U.S. 740 (1942). In the Wisconsin *Auto Workers* case, we concluded that the union tactic was 'neither forbidden by federal statute nor was it legalized and approved thereby.' 336 U.S. at 265." (339 U.S. at 459.)

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[1] The continued vitality of *Briggs & Stratton's* recognition that the NLRA supersedes state law regulating permissible strike purposes is attested to, e.g., by *Teamsters Union* v. *Oliver,* 358 U.S. 283; *Connell Co.*, 421 U.S. at 635-637.

Thus, the "intermittent unannounced work stoppage", the "sit-down strike" and "labor violence" were deemed to constitute a single category of conduct which was subject to state authority on the ground that it "fall[s] outside the protection of the federal Act," and not on the theory, put to rest in *O'Brien*, that the States are entirely free to regulate the range of methods by which the parties to collective bargaining apply economic force. But the subsequent development of the law has invalidated the assumption that these three types of conduct are alike; indeed, the post-*O'Brien* cases demonstrate that Congress, in establishing the federal labor policy, has regarded physical force (the "sit-down strike" and "labor violence") and peaceful economic force (including "intermittent unannounced work stoppages") as opposites.

As both *Briggs & Stratton* and *O'Brien* recognize, from the outset the uniform understanding has been that the NLRA does not sanction the use of physical force. Thus,

> "State jurisdiction • • • [over] conduct marked by violence and imminent threats to the public order • • • has prevailed • • • because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." (*Garmon*, 359 U.S. at 247.)

In contrast there can now be no doubt that the "partial or 'quickie' strike" (Pet. App. A. 14) is part and parcel of the system of free collective bargaining created by the NLRA and that the States are therefore without authority to enjoin the use of that peaceful weapon of economic force. The decisive precedent is *Insurance Agents*. The conduct that gave rise to that case paralleled the concerted activity at

issue in *Briggs & Stratton*:

> "In January 1956 Prudential and the union began the negotiation of a new contract to replace an agreement expiring in the following March. Bargaining was carried on continuously for six months before the terms of the new contract were agreed upon on July 17, 1956. • • •
>
> "The union • • • announced in February that if agreement on the terms of the new contract was not reached when the old contract expired, the union members would then participate in a 'Work Without a Contract' program—which meant that they would engage in certain planned, concerted on-the-job activities designed to harass the company. • • •
>
> "[T]he union's harassing tactics involved activities by the member agents such as these: refusal for a time to solicit new business, and refusal (after the writing of new business was resumed) to comply with the company's reporting procedures; refusal to participate in the company's 'May Policyholders' Month Campaign'; reporting late at district offices the days the agents were scheduled to attend them, and refusing to perform customary duties at the offices, instead engaging there in 'sit-in-mornings,' 'doing what comes naturally' and leaving at noon as a group; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside the various offices of the company on specified days and hours as directed by the union; distributing leaflets each day to policyholders and others and soliciting policyholders' signatures on petitions directed to the company; and presenting the signed policyholders' petitions to the company at its home office while simultaneously engaging in mass demonstrations there." (361 U.S. at 479-481; compare 336 U.S. at 249 quoted p. 4 *supra*.)

However, the path to this Court followed in the two cases differed. In *Insurance Agents* the employer filed its complaint with the NLRB rather than with a state agency. The Board upheld that complaint, ruling that the union's tactics constituted a violation of the obligation to bargain in good faith imposed by §8(b)(3) of the NLRA. This Court reversed.

Mr. Justice Brennan began by stating the basic postulates of the collective bargaining system embodied in the NLRA:

> "[T]he policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace. • • • But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences. • • •
>
> "It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. • • • The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. • • • [A]t the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side." (361 U.S. at 488-489.)

Insurance Agents then states the rule of statutory construction entailed by the philosophy of free collective bargaining as follows: Condemnation of the use of a peaceful economic weapon

> "involves an intrusion into the substantive aspects of the bargaining process—• • • unless there is some specific warrant for [that] condemnation of the precise tactics involved • • •. [For] if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. • • • [But o]ur labor policy is not presently erected on a foundation of government control of the results of negotiations.
>
> • • • •
>
> "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions. But the activities here involved have never been specifically outlawed by Congress. • • • [I]t is [therefore] clear to us that the Board needs a more specific charter than §8(b)(3) before it can add to the Act's prohibitions here." (*Id.* at 490, 498-499.)

The necessity in *Insurance Agents* of defining the scope of §8(b)(3) of the Act provided the occasion for the Court to articulate the central role in the statutory scheme of the permission to employ "economic pressure devices" (*id.* at 489) during bargaining negotiations. But subsequent decisions establish that the principle declared informs the entire Act and not simply that one provision. See, e.g., *Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 282-283 (applying the *Insurance Agents* rationale in holding that §8(b)(1)(A) does not provide a predicate for prohibiting "recognitional" strikes); *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 316-318 (applying that rationale in

holding that §§ 8(a)(1) and (3) do not provide a predicate for prohibiting bargaining lockouts); *Florida Power & Light* v. *Electrical Workers,* 417 U.S. 790, 805 n.16 (applying that rationale in holding that § 8(b)(1)(B) does not provide a predicate for prohibiting union fines levied on supervisor members for engaging in rank and file struck work).

In *Florida Power & Light,* Mr. Justice Stewart stated in precise and summary form the method of approach inaugurated in *Insurance Agents* and followed without deviation since:

> "In light of the fact that 'Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions,' *NLRB* v. *Drivers Local Union No. 639,* 362 U.S. 274, 282-283 (1960), the [Act is to be read as an] admonition against regulation of the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate • • •. *NLRB* v. *Insurance Agents,* 361 U.S. 477, 490 (1960)." (417 U.S. at 805 n. 16.)

(c) The short of the matter is this: The centerpiece of the Act is the "process of collective bargaining [which] leave[s] the results of the contest to the bargaining strengths of the parties." (*Porter Co.* v. *NLRB,* 397 U.S. 99, 108.) To insure the integrity of that process the Act contains an "admonition against regulation of the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate." (*Florida Power & Light,* 417 U.S. at 805.) As *Insurance Agents* holds, there is no "particularized statutory mandate" condemning the use of the "partial or 'quickie' strike." Thus, prohibition of that peaceful form of economic force is contrary to the most basic principle of the Federal labor policy.

In *Teamsters Union* v. *Morton,* 377 U.S. 252, 258, it was "the respondent's contention • • • that since the petitioner union's peaceful conduct was neither arguably protected under § 7 nor arguably prohibited under § 8 of the National Labor Relations Act, as amended, the trial court was free to award damages on the basis of state law for injuries caused by this conduct." The Court replied:

> "But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting § 303, 'Congress occupied this field and closed it to state regulation.' *Automobile Workers* v. *O'Brien,* 339 U.S. 454, 457. • • • The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines,* 372 U.S. 714, 722." (*Id.* at 258-259.)

Morton's elaboration of the reason why application of Ohio's law of secondary boycotts would "frustrate the purposes of the federal legislation" can be accurately paraphrased to demonstrate that the same conclusion follows here:

> "The type of conduct to be made the subject of [injunctive relief] was considered by Congress, and [the Act] comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.' • • • In selecting which forms of economic pressure should be prohibited by [the NLRA], Congress struck the 'balance . . . between the

uncontrolled power of management and labor to further their respective interests,' • • • by 'preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes • • •'.

"In this case, [as *Insurance Agents* holds, the Union's conduct] was not proscribed by the Act. • • • This weapon of self-help, permitted by federal law, formed an integral part of the [Union's] effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. • • • If the [Wisconsin law] can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [the NLRA], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." (*Id.* at 259-260.)

The authority of *Briggs & Stratton* "must [therefore] be regarded as having been worn away by the erosion of time • • • and of contrary authority." (*United States* v. *Raines,* 362 U.S. 17, 26.) All that remains of that decision is the truth that "It is elementary that what Congress constitutionally has been given, the state may not constitutionally take away." (336 U.S. at 254.)

3. Relying on "Briggs and Stratton [as] authority for [its] position" the Wisconsin Supreme Court dismissed *Insurance Agents* as a "case [that] merely holds that the NLRB had no power to regulate strike tactics and left regulation of strike tactics to the states" and that "distinguishes between the power of the states to deal with

strike tactics and the power of NLRB to deal with strike purposes." (Pet. App. A. 10.)

We have already noted (pp. 5-7) that, 25 years ago, in *Automobile Workers* v. *O'Brien, supra* and *Bus Employees* v. *Wisconsin Board, supra,* this Court had rejected the theory stated in *Briggs & Stratton* that the NLRA "left regulation of strike tactics to the states." And, nothing this Court has said or done since has breathed any life into that discredited view.

The other aspect of the reasoning of the court below—that *Insurance Agents* "merely holds" that the NLRB, as opposed to other tribunals, has "no power to regulate strike tactics"—stands on no firmer footing.

In *Howard Johnson* v. *Hotel Employees,* 417 U.S. 249, a case arising under § 301 of the Act, Mr. Justice Marshall noted that *NLRB* v. *Burns Security Services,* 406 U.S. 272, had

> "emphasized that freedom of collective bargaining—'private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract'—was a 'fundamental premise' of the federal labor laws, *id.,* at 287, quoting *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108 (1970), and that it was therefore improper to hold Burns to the substantive terms of a collective-bargaining agreement which it had neither expressly nor impliedly assumed" (*id.* at 254-255);

and that

> "The courts below held that *Wiley* [v. *Livingston,* 376 U.S. 543] • • • [whose] reasoning was to some extent inconsistent with [that of *Burns*] • • • rather than *Burns* was controlling here on the ground that

Burns involved an NLRB order holding the employer bound by the substantive terms of the collective-bargaining agreement, whereas this case, like *Wiley*, involved a § 301 suit to compel arbitration" (*id.*).

And, the *Howard Johnson* Court squarely rejected the conception that there is one national labor policy in Board cases and another in court cases: the "basic policies found controlling in an unfair labor practice context may [not] be disregarded by the courts in a suit under § 301" for that would "permit the rights enjoyed by the • • • employer • • • to depend upon the forum in which the union presses its claims." (*Id.* at 256.)

Insurance Agents, like *Burns*, states a postulate derived from the "'fundamental premise' of the federal labor laws • • • freedom of collective bargaining." In both instances the rule of law announced confined the NLRB, not to denigrate its authority, but to assure that conduct Congress intended to leave unregulated would be free. The *Insurance Agents* opinion concludes:

> "It is suggested here that the time has come for a reevaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress. • • • To be sure, then, Congress might be of opinion that greater stress should be put on the role of 'pure' negotiation in settling labor disputes, to the extent of eliminating more and more economic weapons from the parties' grasp, and perhaps it might start with the ones involved here; or in consideration of the alternatives, it might shrink from such an undertaking. But Congress' policy has not yet moved to this point, and with only § 8(b)(3) to lean on, we do not see how the Board can do so on its own." (361 U.S. at 500; footnote omitted.)

Plainly then, the State courts, with only State law to lean on, cannot on their own move to a point, in eliminating more and more economic weapons from the parties' grasp, beyond the one Congress has occupied. If they do so they act in a manner that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hill*, 325 U.S. at 542.) Moreover, freeing the States to act in this manner would "permit the rights enjoyed by the • • • [union] • • • to depend on the forum in which the [employer] presses its claims." (Cf. 417 U.S. at 256.) Finally, since *Garner* v. *Teamsters Union*, 346 U.S. 485, 489, it has been understood that:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal • • •."

It is therefore contrary to the entire thrust of this Court's decisions to read *Insurance Agents* as granting to the State courts the sole authority to regulate the central and sensitive subject of "strike tactics." Thus, here as in *Howard Johnson*, the court below erred in "disregard[ing] • • • the basic policies found controlling in an unfair labor practice context" (417 U.S. at 256).

The Wisconsin Supreme Court's failure to appreciate the full impact of *Insurance Agents* caused it to misunderstand also the controlling significance of *Morton*:

> "In Morton the fact of congressional focus showed that the activity was beyond state jurisdiction. Such is not the case here. Unlike the very comprehensive statutory treatment of secondary boycotts, Congress has not 'focused upon' partial or 'quickie' strikes. Policing of such conduct is left wholly to the states." (Pet. App. A. 14.)

In *Morton* the Court relied on its holding in *Carpenters Local* v. *Labor Board,* 357 U.S. 93, 99, that "a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees," as support for its conclusion that in regulating the secondary boycott Congress intended to permit the use of the economic weapon the Teamsters Union employed there. While §§ 8(b)(4) & 303 embody one important facet of the national labor policy, they sound a secondary and not the primary theme.

Here, the holding in *Insurance Agents* that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions. But the activities here involved have never been specifically outlawed by Congress. * * * [I]t is [therefore] clear to us that the Board needs a more specific charter than § 8(b)(3) before it can add to the Act's prohibitions" (361 U.S. at 498-499), supports the conclusion that in regulating the primary strike Congress intended to permit the "partial strike."

Moreover, the statutory treatment of the secondary boycott is far less comprehensive than the NLRA's regulation of primary labor disputes which are the Act's main concern. As we have stressed throughout, the focus of the Federal labor policy is the system of free collective bargaining and the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties [which] is part and parcel of [that] system" (*Insurance Agents,* 361 U.S. at 489). The primary conduct Congress intended to prohibit is described with particularity in §§ 8(a), 8(b) & 8(d). The intent to preserve all the peaceful weapons

of economic pressure not there condemned is explicitly stated in §§ 7 & 13 and is implicit in the entire statutory scheme. Thus, here as in *Morton,* if the State were permitted

> "to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [the NLRA], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." (377 U.S. at 260.)

CONCLUSION

For the above stated reasons, the decision below should be reversed.

Respectfully submitted,

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